No. 77-891

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK S. BEAL, Secretary of Welfare of the Commonwealth of Pennsylvania, **ROBERT P. KANE**, Attorney General of the Commonwealth of Pennsylvania, **THE COMMONWEALTH OF PENNSYLVANIA**, and **F. Emmett Fitzpatrick**,

Appellants,

vs.

JOHN FRANKLIN, M.D. and **OBSTETRICAL SOCIETY OF PHILADELPHIA**,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION AND BRIEF, AMICUS CURIAE OF AMERICANS UNITED FOR LIFE, INC. IN SUPPORT OF APPELLANTS BEAL, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PURPOSE OF THIS MOTION

J. Jerome Mansmann, Special Assistant Attorney General of Pennsylvania, representing appellants, has given consent for the filing of this amicus brief. Roland Morris, attorney for the appellees, has indicated that he will interpose no objection to the filing of this brief and that he understands this will be treated as the consent of the appellees under Rule 42(2) of the Supreme Court. Letters from each attorney stating the above have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

Americans United for Life (AUL) is a national educational foundation organized to educate and promote better understanding of the humanity of the unborn and the value of human life. Its national office is located in Chicago, Illinois, and its membership includes approximately 20,000 persons located in every state of the union.

The Board of Directors and Officers of Americans United for Life include the following:

This brief Amicus Curiae is filed in support of the Appellants, Beal et al., and also to present the arguments to this Court that the Pennsylvania statute challenged herein does not burden or impede the woman's right to privacy.

Respectfully submitted,

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June 6, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-891

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BRIEF AMICUS CURIAE

NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated in the Brief of Appellants Beal, et al.

ARGUMENT

I.

THE PENNSYLVANIA STATUTE DOES NOT IMPEDE OR BURDEN THE RIGHT TO TERMINATE PREGNANCY

The Pennsylvania statute attempts to penalize adverse treatment of the viable fetus during the course of pregnancy termination when such adverse treatment is unnecessary to the protection of maternal health or the effectuation of the woman's right of privacy.

In their Motion to Dismiss or Affirm at 3, appellees argue that "the purpose of an abortion is *invariably* to obviate rather than facilitate a live birth." (Emphasis added.) Appellees thus assert that a woman's constitutional right to abortion "invariably" includes a right to produce a dead fetus. They argue so without reference to the age or development of the fetus. This is the issue which this Court presently confronts.

In order for this Court to find that the Pennsylvania statute burdens abortional privacy, it logically must first find that the woman's abortional freedom permits her actively to seek the death of her fetus even though there is a possibility that the fetus might otherwise survive. Nowhere has this Court held that the right secured in *Roe* v. *Wade,* 410 U.S. 113 (1973), is so expansive as appellees suggest. Fetal death might be the inevitable result of early abortion, but this Court has never held that the right of privacy is to be equated invariably with a "right" to directly seek fetal injury or death as appellees assert in their Motion to Dismiss or Affirm. That right of privacy does not include the right to a dead fetus.

As a Three Judge Federal Court has recently unanimously stated, upholding an Illinois statute[1] with an effect similar to that now before this Court:

> [The statute] does not require that the physician increase the risk to the woman in order to save the fetus. If, however, there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure which is least likely to kill the fetus. This choice would not interfere with the woman's right to terminate her pregnancy. It never could be argued that she has a constitutionally protected right to kill the fetus. She does not.

Wynn v. *Scott,* No. 75 C 3975 (N.D. Ill., filed April 12, 1978) (Circuit Judge Tone and District Judges Marshall and Kirkland).

Applying this reasoning to the Pennsylvania statute we see that the Pennsylvania statute does not regulate "abortion" at all in the sense that it would burden or impair the woman's right to end pregnancy safely. It penalizes hostile activity directed toward the fetus unrelated to the exercise of the woman's privacy interest. The Pennsylvania law may be conceived to burden the right recognized in *Roe* only if that right is understood to be indistinguishable from license to commit feticide. This Court has held that the state maintains an interest in the fetus throughout

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[1] ILL. REV. STAT. chap. 38, sec. 81-26(1) (1976): "No person who performs or induces an abortion after the fetus is viable shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall intentionally fail to take such measures to encourage or to sustain the life of viable fetus or child, and the death of the viable fetus or the child results, shall be deemed guilty of a Class 2 felony."

pregnancy, *Maher* v. *Roe*, 432 U.S. 464, 478 (1977), and a compelling interest upon the onset of viability, *Roe*, 410 U.S. at 163.

The District Court misread these holdings to mean that any regulation on behalf of the fetus prior to the time the fetus "is viable" violates the Constitution.[2] But such an

[2] The District Court's conclusion rested upon the assumption that this Court found that viability could not exist prior to the 24th week of gestation as a matter of law. *Planned Parenthood Assoc.* v. *Fitzpatrick*, 401 F.Supp. 554, 572 (E.D. Pa. 1975). In fact, this Court has strongly emphasized that "viability" is a flexible concept which must be applied on a case by case basis in accord with developing medical technology, and has specifically rejected any inference that a specific time in gestation must be established to mark the onset of viability *Roe*, 410 U.S. at 164; *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 64-65 (1976). That the Pennsylvania statute may regulate abortion upon behalf of the fetus prior to 24 weeks gestation by no means causes it to become automatically unconstitutional.

The District Court relied upon *Hodgson* v. *Anderson*, 378 F.Supp. 1008 (D. Minn. 1974), *appeal dismissed sub nom. Spannas* v. *Hodgson*, 420 U.S. 903 (1975) and *Leigh* v. *Olson*, 385 F.Supp. 255 (D. N.D. 1974). *See Planned Parenthood* v. *Fitzpatrick*, 401 F.Supp at 572. *Leigh* concerned possible saving construction of a North Dakota abortion statute in the wake of *Roe*, not with the standard of care of the physician where the fetus is or may be viable. *Leigh*, 385 F.Supp. at 259-261. *Hodgson* concerned a statute which fixed the time of viability and "potential viability" at a definite point. *Hodgson* v. *Anderson*, 401 F.Supp. at 1016.

It is difficult to see in what manner *Leigh* is applicable in the present context. But the District Court in the instant case apparently derived its position that any regulation on behalf of the fetus prior to the 24th week of pregnancy is unconstitutional from *Hodgson*. *Id.* Under *Danforth*, 428 U.S. at 64-65, however, the Minnesota statute is unconstitutional not because it purports to regulate prior to the 24th week of pregnancy, but because it interferes with the physician's discretion. It is to be noted that the Pennsylvania statute leaves the determination whether the fetus is or may be viable to the physician.

analysis of the decision in *Roe* perverts its underlying rationale. State regulation of abortion is not forbidden by the Constitution as a matter of absolute, abstract principle but only to the extent that such regulation burdens or obstructs the exercise of the woman's abortional freedom without compelling purpose. "Regulation" of abortion on behalf of maternal health in the first trimester would not be forbidden if it did not in fact burden or infringe upon abortional privacy. Similarly, regulation on behalf of the fetus, whether or not such regulation is conceived to impact upon the second trimester, requires no compelling state purpose if it does not obstruct exercise of the right secured in *Roe*.

Obviously, in the earlier stages of pregnancy, abortion inevitably causes fetal death under present medical technology since, regardless of the method employed, the fetus will not survive—is not "viable." Hence the state interest in fetal life in earlier pregnancy might only be secured by proscribing altogether the abortion procedure, which it may not do without compelling interest at stake.[3]

[3] *Danforth*, 428 U.S. at 81-83. The District Court finds no support for its position in *Danforth*, where this Court held unconstitutional a portion of a Missouri statute which required the physician to employ the same standard of care toward a fetus during the course of abortion that he would should it be intended that the fetus be born alive. *Id.* A literal reading of the Missouri statute would obviously have precluded all abortion since under this standard, no abortion whatever might be performed. But the Pennsylvania law presently before this Court clearly contemplates that abortion shall be performed. Otherwise, it would not provide that abortion should be performed in a manner to maximize opportunity for fetal survival. Further, the Pennsylvania statute applies at a time in pregnancy when it is possible that the life of the fetus might be preserved in some manner other than through merely continuing pregnancy. Finally, the restrictions upon physician technique do not apply to the extent that some increased risk to the mother might arise and, hence, do not interfere with any attempt to maximize maternal health through abortion.

Moreover, state regulation during the course of abortion on behalf of fetal life prior to viability would serve no rational purpose since the fetus must inevitably die as result of any abortion performed.[4] But it does not follow,

[4] The state, however, is not wholly disinterested in the manner abortion is performed even prior to the time that the fetus is or may be viable. Thus, numerous statutes and regulations have been adopted to control fetal experimentation conducted during the course of or as an incident to abortion. Such regulation is justified upon the same grounds as the Pennsylvania statute: neither fetal experimentation nor any other adverse treatment unnecessary to fetal expulsion falls within the protected zone of privacy recognized in *Roe*. *See, e.g.* ILL. REV. STAT. ch. 38, sec. 81-26(2) (1976); MASS. GEN. LAWS ANN. ch. 112, sec. 12J (West) (Supp. 1976-77) (amended); NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, REPORT AND RECOMMENDATIONS: RESEARCH ON THE FETUS, [DHEW Publication No. (OS) 76-127, 1975], *also printed in* 40 Fed. Reg. 33,530 (1975) (partially codified in 45 C.F.R. sections 46.101-.301 (1976)), hereinafter COMMISSION REPORT. For survey of state and common law relating to fetal research, see Capron, *The Law Relating to Experimentation with the Fetus*, In NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *Appendix* to REPORT AND RECOMMENDATIONS: RESEARCH ON THE FETUS (DHEW Pub. No. (OS) 76-128, 1975). Note that the Commission defined "fetus" as a human being from the time of implantation until a determination is made that the fetus is viable or possibly viable. COMMISSION REPORT, *supra*, at 40 Fed. Reg. 33,531 (1975). The Commission then stated: "If it is viable or *possibly viable*, it is thereupon designated an infant." *Id.* (Emphasis added). *Cf. Symposium On the Report and Recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Research on the Fetus*, 22 VILL. L. REV. 2, 297-417 (1976-77); Note *Fetal Experimentation: Moral, Legal and Medical Implications*, 26 STAN. L. REV. 1191 (1974); Burger, *Reflections of Law and Experimental Medicine*, 15 U.C.L.A. L. REV. 436 (1968).

even in earlier pregnancy, that the woman's privacy interest in pregnancy termination is identical to any presumed "unlimited right to do with the fetal body what one wishes" even to the extent of medically unnecessary killing. Abortional privacy does not rest upon such a principle even in relation to the woman. *Roe*, 410 U.S. at 154.

Roe held that at that point where, under contemporaneous medical technology, an exercise of abortional freedom might be separated from fetal death—at viability—the state's interest in abortion becomes "compelling" and warrants direct interference with pregnancy termination. *Roe*, 410 U.S. at 163. But selection of viability as the critical point when the state might directly interfere with abortion on behalf of the fetus can only be justified in relation to a concept of the privacy right at stake in abortion based upon an inherent distinction between pregnancy termination and feticide. If an essential element of the right recognized in *Roe* is the "right" to prevent production of a living infant, then it is absurd to allow that the state may proscribe an exercise of the "right" to prevent production of a living infant at viability, which is precisely the time when a living infant may in fact be produced.[5]

[5] The District Court wholly failed to account for this Court's definition of viability in *Roe* as *"potentially* able to live outside the mother's womb, albeit with artificial aid," *Roe*, 410 U.S. at 160 (emphasis added), when it reached the conclusion that viability may not be conceived to occur before 24 weeks gestation and that "may be viable" carves out time in pregnancy inconsistent with *Roe*. "Viability" is not a fact which can be established with certainty until an infant actually survives upon birth. While a child is *in utero* and is "potential" the physician can do little more than weigh probability that a child with a given birth weight would survive at birth. Birth weight itself is unknown *in utero* and must be hypothesized based upon duration of pregnancy. Finally, the duration

(footnote continued)

In the context of *Roe*, it is far more rational to assert, as does your amicus, that the right to terminate pregnancy is no more or less than the right to expel the fetus from the womb and does *not* include a "right" to production of a dead fetus. Perceived in this manner, the state maintains an interest on behalf of fetal life (and in the manner in which the abortion procedure is performed) to the extent that an exercise of this right would not inevitably result in fetal death. To the extent that the woman's fundamental privacy interest and the state's interest in fetal protection might both be realized there is no logical or constitutionally cognizable reason why the state might not act to protect its interest while fully permitting the woman to exercise her right to termi-

(footnote continued)
of pregnancy is itself not always certain. "Potentially" able to live outside the womb thus is not the same as "certainly" able to live outside the womb either in logic or medical practice. The concept of potentiality itself carries with it the very aspect of contingency and uncertainty expressed where the Pennsylvania statute regulates abortion according to the physician's judgment that the fetus "may be" viable. This is apparently the view of the authorities which this Court cited in support of its definition of viability, *Roe*, 410 U.S. at 160 n. 59: the fetus is to be considered "potentially" able to survive when he *might* survive upon birth.

DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1713-14 (25th ed. 1974) does not refer to an age criterion as an indication of viability. But. L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS (14th ed. 1971) allows that "viability" has been interpreted to exist between 400 grams fetal weight or 20 weeks of gestation and 1000 grams or 28 weeks, *id.* at 493, and takes the position that 20 weeks or 400 grams is the point at which viability might "logically be set" in view of fetal survival at that age. *Id.* at 1027. STEDMAN'S MEDICAL DICTIONARY 1551 (23rd ed. 1976) likewise refers to viability as usually connoting "a fetus that has reached 500 grams in weight and 20 gestational weeks." It is thus not at all certain, as the District Court seemed to assume, that the Pennsylvania statute even purports to regulate on behalf of the fetal life prior to the time this Court has determined is the threshold of the compelling state interest in the fetus.

nate pregnancy. This conclusion is fully consistent with analogies drawn from other areas of law where privacy interests of a fundamental character have found recognition under the Constitution.

The Pennsylvania statute cannot easily be conceived to justify governmental interference in an area of traditional "intimacy" or privacy as in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). A decision to cause fetal harm bears no necessary relationship to the decision of an individual whether or not to "beget or bear" a child protected in *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

The parent maintains a fundamental private right to control the education and development of children—a right conceived by this Court to be "closely analogous" to that of *Roe*. *Maher*, 432 U.S. at 476. Indeed, this Court has identified *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) as direct precedents under the Fourteenth Amendment to recognition of abortional freedom. *Roe*, 410 U.S. at 152-153. Though the parent maintains a fundamental privacy interest in relation to the child, it does not follow that every state action which purports to regulate the manner in which the education or development of the child is pursued must rest upon a "compelling" interest.' The zone of parental privacy has never been held to encompass such a broad area. The state would be hard put to show that each and every of its myriad statutes and administrative regulations which control the education of children are grounded in a compelling purpose. A substantial portion of governmental control of the child's educational development bears little, if any, relation to manifestation of the parents' fundamental privacy interest—indeed, most such governmental regulations create no obstacles to parental control, but merely designate the context in which control

shall be exercised. Similarly, the Pennsylvania statute before this Court creates no obstacle to abortion but is fashioned to protect the state's interest in the fetus to the extent that that interest may be protected without obstructing the woman's right to terminate her pregnant condition.

Because the Pennsylvania statute controls only the manner or context in which abortion is performed on behalf of valid interests it does not block effectuation of any privacy interest as does, for example, a zoning ordinance which penalizes any exercise of familial cohabitation beyond the nuclear family. *Moore* v. *City of East Cleveland,* 431 U.S. 494 (1977). The Pennsylvania statute does no more than control the manner of distribution of the service sought and offered without effectively proscribing it. From this perspective, it is certainly no more a burden upon abortional liberty to require that abortion be effectuated without unnecessary harm to the fetus than it is a burden upon First Amendment freedom to require that purveyors of certain printed materials be located in a specified manner when it is demonstrated that harm to valid governmental interests might otherwise result. *Young* v. *American Mini Theatres,* 427 U.S. 50 (1976).

Indeed, any asserted right to inflict unnecessary harm upon the fetus during the course of abortion is not a "right" at all since it falls outside the zone of privacy wherein the woman may effectively cause fetal expulsion. By analogy, though the right of privacy protects the individual from state prosecution where possession of offensive materials is within the privacy of the home, *Stanley* v. *Georgia,* 394 U.S. 557 (1969), possession of the same materials outside the boundaries of the protected zone of the home is not so protected. *U.S.* v. *Reidel,* 402 U.S. 351 (1971); *Paris Adult Theater* v. *Slaton,* 413 U.S. 49 (1973); *U.S.* v. *Orito,* 413 U.S. 139 (1973); *U.S.* v. *12 200-ft. Reels,* 413 U.S. 123 (1973).

Thus the Pennsylvania regulation before this Court is different in kind from the laws invalidated in previous abortion decisions. Just as the Connecticut regulation of state funds challenged in *Maher,* the Pennsylvania regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to abortion. The aborting woman suffers no disadvantage as a consequence of Pennsylvania's attempt to allow the child to live if that is possible. The woman's or doctor's desire to kill the fetus in addition to terminating the pregnancy must not override the state's interest in the child.

The fact that the aborting woman may not be assured that the fetus will be aborted dead or the inability of the woman to practice a prenatal policy of eugenic death selection based upon supposed physical defects is constitutionally irrelevant. If the state wishes to encourage all viable children to live regardless of physical condition, circumstances of birth or "wantedness" by the parents, this is a matter appropriately for the state so long as the limited right of the woman recognized in *Roe* may be exercised.[6]

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[6] Although appellees suggest that the "purpose" of abortion is "invariably to obviate live birth," the Constitution does not guarantee any particular purpose must be accomplished through an exercise of any privacy interest. Thus, parents who seek foreign language instruction of religious education for their child—right protected by *Meyer* and *Pierce*—no doubt desire that the child will become linguistically competent or religiously orthodox just as the woman who procures abortion may prefer the fetus will not survive the procedure. But the Constitution is not violated because the woman's expectation of a dead fetus remains unfulfilled, any more than it is violated should the child sent to parochial school become heterodex.

The Pennsylvania statute before this Honorable Court in no way denies or infringes upon the recognized right of the woman to terminate pregnancy safely. It is solely directed toward protection of the fetus from unnecessary harm caused during the course of abortion and cannot be conceived to infringe upon the woman's right to end her pregnant condition. With regard to the right recognized in *Roe*, the woman is in the same position she was prior to enactment of the statute. *Maher*, 432 U.S. at 474. Since the Pennsylvania statute infringes upon no fundamental right, it is valid if rationally related to valid state interests.

II.

THE PENNSYLVANIA STATUTE RATIONALLY RELATES TO VALID STATE INTERESTS BY PROTECTING VIABLE FETAL LIFE FROM MEDICALLY UNNECESSARY HARM AND THE PHYSICIAN FROM PROSECUTION.

The court below misconstrued the Pennsylvania standard "may be viable" as shortening the period of viability to something less than 24 to 28 weeks. This is not so. The standard "may be viable" does not refer to a shortened fetal gestational period but rather to the subjective medical judgment of the attending physician. The determination of viability is a subjective medical judgment to be made by the attending physician in each case based upon the relevant data and in the exercise of a reasonable degree of medical certainty. Where a physician in the exercise of that subjective judgment cannot say with certainty that a fetus "is viable" yet performs a late abortion without regard to the reasonable possibility that the fetus is viable

he certainly assumes a known risk for whatever consequences to a live born infant may result.[7]

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[7] Those consequences are the consequences which flow from the killing of a human being. 4 W. BLACKSTONE, COMMENTARIES * 198 (1769); 3 COKE, INSTITUTES * 58 (1648); BRACTON, THE LAWS AND CUSTOMS OF ENGLAND, III, ii, 4, quoted and translated in Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 419 (1968); *Rex* v. *Senior*, 1 *Moody's Crown Cases Reserved* 346, 168 *English Reports* 1298 (1832); *Queen* v. *West*, 2 *Carrington and Kirwan* 784 (Nisi Prius 1848).

American authorities are in accord. A commission on Massachusetts law headed by Joseph Story reported in 1844: "If a child be born alive and then die, in direct consequence of potions administered, or violence done before its birth, or during its birth, it is the killing of a human being." Phillips and Walcott, *Report of the Criminal Law Commissioners on the Penal Code of Massachusetts* ch. 7, sec. 33 (1844). *Cf. Pennsylvania* v. *McKee*, 1 Add. 1 (Pa. 1797); *Clarke* v. *State*, 117 Ala. 1, 23 So. 671 (1898); *Morgan* v. *State*, 148 Tenn. 417, 256 S.W. 433 (1923); *State* v. *Cooper*, 22 N.J.L. 52 (1849). The National Commission for the Protection of Human Subjects advised the Commission in 1975 that if parents consented to, or a physician inflicted, injuries on the unborn child during an abortion and the child was born and died of the injuries, "the most dire consequences for the parents or physician would come under the criminal law, which regards it as murder or manslaughter if prenatal injuries bring about postnatal death." Alexander M. Capron, *The Law Relating to Experimentation with the Fetus*, COMMISSION REPORT, supra at n. 2, *Appendix to Research on the Fetus*, pp. 13-21. *Cf.* R. PERKINS, CRIMINAL LAW, *at* 30 (2nd ed., 1969): If a pregnant woman is injured by some act of another person and a child is born alive who dies of the injury inflicted before birth, or who dies because the injury caused it to be born too soon, this is homicide."

Once an infant is born alive it is irrelevant whether it is to be considered "viable" or not: "As we have seen, nonviable fetuses

(footnote continued)

The Pennsylvania statute frees the physician to perform late abortion where it is uncertain whether the fetus is viable, so long as abortion is performed in accord with the statutory standard of care. As such, the statute protects the physician from prosecution or civil suit[8] which may arise out of the contingent nature and result of late abortion performed in such circumstances.

Further, it might never be possible to protect the compelling interest of the state in the viable fetus unless the

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(footnote continued)

ex utero have been regarded as persons under the common law of crimes, protected against murder and assault; under statutory law a still greater burden of care (than might be warranted by its "nonviability") may be imposed as in some abortion laws, and restrictions may be placed on what can be done with it, as in the statutes governing what Louisiana vividly denominates "the crime of human experimentation." The common law of torts and property, and the rules of equity, also regard the nonviable fetus *ex utero* as a "person" to be accorded the full protection of the law. Although its small size and weight and general lack of development preclude such a fetus from having any true independent existence, the fact of its physical separation from its mother is sufficient to confer upon it the presumption of such independence." Capron, *supra*, 13-25 (footnotes omitted).

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[8] *Carroll* v. *Skloff*, 415 Pa. 47, 202 A. 2d 9 (1964). *Cf.* W. PROSSER, LAW OF TORTS, sec. 55, at 335 (4th ed. 1971). The majority of courts have held that the viable fetus *in utero* is a "person" for purpose of wrongful death statutes. *Id.* at 338, 338 n. 7. *See also Chrisafogeoris* v. *Brandenberg*, 55 Ill.2d 368, 304 N.E. 2d 88 (1973); *Libbee* v. *Permanente Clinic*, 268 Ore. 258, 518 P.2d 636 (1974); *Eich* v. *Town of Gulf Shores*, 293 Ala. 95, 300 So.2d 354 (1974); *Mone* v. *Greyhound Lines Inc.*, 331 N.E. 2d 916 (Mass 1975).

state is empowered to control the manner of abortion where the fetus may be viable. This is so because the physician—in order to avoid prosecution for performance of abortion where it develops that the fetus is in fact viable—would be strongly motivated to perform "abortion" to assure that the fetus will not survive upon birth, thus tending to prove the fetus was not viable in the first place.

Consequently, the standard created by the Pennsylvania statute protects both physician and the viable fetus without in any way interfering with the woman's right to abort. As such, the Pennsylvania statute rationally relates to valid state interests and is clearly constitutional. *Maher*, 432 U.S. at 478; *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972); *Massachusetts Bd. Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976).

CONCLUSION

The Pennsylvania statute does not burden or impede the right to privacy and is rationally related to valid state interests.

Respectfully submitted,

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Law student Thomas J. Marzen assisted in the preparation of this Brief.

APPENDIX

The Pennsylvania Abortion Control Act, P.L. 209 of 1974

Section 5. Protection of Life of Fetus.

(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

STATE OF ILLINOIS)
) ss.
CITY OF CHICAGO)

CERTIFICATE OF SERVICE

I, Dennis J. Horan, one of the attorneys for Amicus Curiae, being a member of the Bar of the Supreme Court of the United States, do hereby certify I have caused a true and correct copy of the foregoing motion, to be served upon Appellants and Appellees they being all the parties of record by depositing such motion in a United States Post Office mailbox, with first-class postage prepaid addressed to J. Jerome Mansmann, at his office of record, Sixth Floor-Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania 15219, attorney for Appellants; and Roland Morris, 16th Floor, 100 South Broad Street, Philadelphia, Pennsylvania 19110, attorney for Appellees, this 6th day of June, 1978.

.....
Dennis J. Horan